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No. 99-1680

IN THE

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF COMMUNITY DEFENSE COUNSEL IN SUPPORT OF RESPONDENT, CITY OF WAUKESHA.

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INTEREST OF AMICUS*

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amicus Community Defense Counsel discloses that no counsel for any party in this case authored in whole or in part this brief. A monetary contribution to the preparation of this brief was received from the Alliance Defense Fund.

Community Defense Counsel (CDC) is a nonprofit law firm practicing exclusively in the area of adult business regulation on behalf of local communities. CDC serves the public interest through municipal league training seminars, legal resources, and litigation services. CDC has drafted hundreds of ordinances for municipalities across the country.

The crime, blight, and spread of disease caused by sexually oriented businesses are an ongoing concern for the local governments CDC serves. A narrowly tailored, content neutral licensing regulation furthers the substantial government interest of preventing such harmful effects. As *Amicus Curiae*, CDC's expertise would assist this Court in analyzing the relevant case law regarding this important decision. CDC files this brief in support of Respondent City of Waukesha and urges this Court to affirm the holding of the Court of Appeals of Wisconsin.

SUMMARY OF ARGUMENT

This facial challenge arises from a restraint imposed on a sexually oriented business *after* the business was found to have committed, in one year, nine violations of a content neutral licensing regulation. The City of Waukesha, Wisconsin ("Waukesha") did not renew City News & Novelty, Inc.'s ("City News") adult business license once it determined that City News violated Waukesha's adult business licensing ordinance by, *inter alia*, allowing customers to engage in sexual conduct inside booths allegedly reserved for viewing sexually explicit movies. *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 876 (Wisc. Ct. App. 1999). This

decision had nothing to do with the content of any protected speech; thus, the entire rationale undergirding the prior restraint doctrine (the prevention of censorship) is wholly absent from this case. The question presented here is whether, notwithstanding content neutral justifications for not renewing a license, communities must allow continued operation of harmful commercial enterprises during the entirety of judicial review.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), six Justices of this Court noted the critical distinction between content based review of speech and content neutral regulation of secondary effects. While failing to agree on the implications of such a distinction, the Court affirmed that municipalities may regulate sexually oriented businesses through content-neutral licensing ordinances. Specifically, cities may choose not to license, or revoke or not renew the license of, an offending business in the interest of preventing the harmful effects of the sexually oriented enterprise.

This case presents the opportunity to clarify the applicability of *Freedman* standards to a content neutral context in which the suppression of ideas is not at risk. This Court's decision should be guided by Justice O'Connor's plurality opinion in *FW/PBS*: "In *Freedman*, the censor engaged in direct censorship of particular expressive material .... Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.* at 229 (plurality). Under this distinction, the Waukesha ordinance should be examined as a content neutral regulation of expressive

conduct (operation of a commercial enterprise engaged in expression-related activity for profit) and subjected to intermediate scrutiny. This mode of analysis is jurisprudentially sound and logically consistent with an admittedly content neutral regulation.

If the Court concludes that the first two prongs of *Freedman* are nevertheless required, the Waukesha Municipal Code § 8.195 and the attendant administrative appeal statute, Chapter 68, Wisconsin Statutes, fully meet the *FW/PBS* plurality's procedural safeguard requirements. The city decides whether to issue or renew a license within a definite and reasonable period of time during which the status quo is maintained. Moreover, access to the Wisconsin state courts is immediately available following either the city's initial determination or the administrative appeal process under Wisconsin law.

Amicus urges this Court to hold that, at least in cases such as this where the business has previously been given a license, the enterprise's status quo should be maintained only during the term on the face of the license. The city's objective determination – here, upon evidence of judicial convictions and within 21 days – that ordinance violations justify nonrenewal is in no way a *prior* restraint. Rather, it is a sanction for prior misconduct and serves to prevent future harm to the public health, safety, and welfare. Requiring local ordinances to allow continued operation of violative businesses during administrative and judicial review would effectively neuter regulatory efforts to proactively control secondary effects. This is a situation that *Freedman*, with its focus on censorship of individual works, clearly did not envision.

For this reason, if the Court concludes that prompt judicial review is required on the facts of this case, the Court should hold that access to an independent judicial officer satisfies constitutional requirements. Because no ideas are being suppressed during such judicial review, the rigorous standards explicated in *Freedman v. Maryland*, 380 U.S. 51 (1965) are neither compelled nor deserved in this situation. *FW/PBS*, 493 U.S. at 229-30. "[N]o one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *Id.* at 248 (White, J., and Rehnquist, C.J., concurring in part and dissenting in part). In a motion for a temporary restraining order or injunctive relief, judicial officers are compelled to assess the likelihood of success on the merits and commonly grant such relief pending trial on the merits.

Unlike the theater operators in *Freedman*, sexually oriented businesses have the monetary incentive to pursue an adverse licensing decision to the courts, diminishing even further the threat that any ideas would be suppressed. *Id.* at 230 (plurality opinion). The central concern of the First Amendment remains the free flow of content to its intended audience, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78-79 (1976) (Powell, J., concurring), and in this Information Age, content neutral regulations are no threat to that constitutional ideal.

This Court should affirm the Court of Appeals of Wisconsin's decision and recognize the *FW/PBS* plurality's opinion as this Court's standard regarding requisite procedural safeguards for SOB licensing ordinances.

ARGUMENT

I. The Rationale Behind Prior Restraint Does Not Apply to Content Neutral Regulations Designed To Prevent Secondary Effects, Especially Where the Restraint Occurs Not Prior To, But After The Ordinance Has Been Violated.

The history of the prior restraint doctrine shows that its purpose is prevent government control of expression – i.e., censorship. However, an ordinance that seeks to prevent crime and conduct inimical to the public health, safety, and welfare, by denying licenses to businesses recently found to have violated such content neutral standards, does not pose any risk of censorship. Indeed, City News operated for a period of years in the City of Waukesha, and was allowed to continue even after violating the ordinance. This fact, dismissed by Petitioner as "immaterial," Pet. Brief. at 10, is highly relevant because it demonstrates that Waukesha's purpose is not the suppression of disfavored expression, but rather the legitimate goal of preventing secondary effects. Waukesha's decision to not *renew* the license of an offending business is not then a *prior* restraint, but a sanction for past misconduct and a reasonable method of preventing future harmful secondary effects.

"The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding certain communications* when issued in advance of the time that such communications are to occur.'" *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of*

Speech § 4.03, p. 4-14 (1984) (emphasis added)). "Prior restraint arises where the content of the expression is subject to censorship." *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220 (10th Cir. 1990) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, (1931)). The "two evils" of prior restraint, unbridled discretion and impermissible delay, are rooted in the government's ability to control what communications will be expressed – either through subjective standards that can be coercively applied or via excessive delays during which the subject communication is suppressed. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27 (1990) (citing *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988)).

Six of the nine justices in *FW/PBS* concluded that enforcing general qualifications for persons seeking to operate sex-related businesses is a ministerial act that does not bear the "heavy presumption" that accompanies prior restraints. In the plurality opinion, Justice O'Connor, joined by Justices Stevens and Kennedy, explained:

> The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman*, the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman*, was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once

> in court. Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid."

FW/PBS, Inc., 493 U.S. 215, 229 (1990) (plurality opinion).

Justice White, joined by Chief Justice Rehnquist, dissented from the Court's decision to invalidate the Dallas ordinance, explaining that prior restraint analysis did not apply because the law was designed to prevent secondary effects and not the dissemination of expression. Instead, *Renton* and *Young* governed:

> . . . The ordinance in no way is aimed at regulating what may be sold or offered in the covered business. With a license, operators can sell anything but obscene publications. Without one – without satisfying the licensing requirements – they can sell nothing because the city is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses.
>
> . . . [In *Freedman*], the board was approving or disapproving every film based on its content and its suitability for public viewing . . . As I have said, however, nothing like that is involved here; the predicate identified in *Freedman* for imposing its procedural requirements is absent in this case.

439 U.S. at 244-45 (White, J., dissenting).

Justice Scalia, noting that the Dallas ordinance "entails no risk of suppressing even a single work," eschewed prior restraint analysis and would have upheld the law as a constitutional means of preventing pandering. *Id.* at 262-63 (Scalia, J., dissenting).

This critical distinction between judging the content of speech and setting standards for persons operating historically problematic businesses has been properly applied by the courts under *O'Brien*, both before and since *FW/PBS*. *See*, *e.g.*, *Airport Bookstore v. Jackson*, 242 Ga. 214, 222-23 (1978) (upholding 5-year disability for persons convicted of sex-related offenses); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (upholding disability provision as narrowly tailored and constitutional); *Tee & Bee, Inc. v. City of West Allis*, 936 F. Supp. 1479, 1487 (E.D. Wis. 1996) (finding sex-related civil disabilities reasonable and narrowly tailored); *DLS, Inc. v. City of Chattanooga*, 127 F.3d 403, 414-15 (6th Cir. 1997) (noting civil disabilities provision "does not allow City officials to exercise discretion by passing judgment on the content of the protected speech . . . . [T]he decision-maker . . . is constrained by objective criteria and the standards for licenses and permits under [the age and civil disability provisions] do not violate the constitution.")

The application of this distinction is even more appropriate in this case, where the decision at issue is not the denial of an *initial license application* because of prior criminal conduct, but rather a decision to not renew made *after* evidence is shown that the law has been violated. Thus, this case is more akin to this Court's rulings in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 n.2, 707 n.4 (1986) and *Alexander*, 509 U.S.

at 553. Because the content of expression is irrelevant to the City's decision, the rationale behind the prior restraint doctrine is wholly absent in situations like these, and the Court should apply the test for content neutral regulations of expressive conduct. *See U.S. v. O'Brien,* 391 U.S. 367, 377 (1968); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

II. If The First Two *Freedman* Standards Apply To Content Neutral Licensing Regulations, Waukesha Municipal Ordinance § 8.195 And Chapter 68, Wisconsin Statutes, Properly Read, Provide These Procedural Safeguards.

Waukesha denied City News's application to renew its adult business license because it found that City News had violated several provisions of Municipal Ordinance § 8.195. 604 N.W.2d at 876. "The violations included permitting minors to loiter on the premises, failing to maintain an unobstructed view of the viewing booths and allowing patrons to engage in sexual conduct inside the booths." *Id.*

These are the facts of the case. However, the opening pages of Petitioner's brief is devoted to cataloging a parade of hypothetical horrors that supposedly justify facial invalidation of the Waukesha ordinance. Pet. Brief. at 5-8 (claiming that the hearing can be continued repeatedly and indefinitely). None of these speculations justify invalidation of the ordinance in all of its applications.

A. Petitioners Mistakenly Presume Bad Faith Enforcement And Rely Upon Far-Fetched Hypotheticals To Justify Their Reading Of The Waukesha Ordinance

Petitioner's Statement of the Case paints a grave picture whereby City officials maintain the power to deny licenses through an intricate series of hidden delays and shadow deadlines. This presumption of bad faith on the part of local officials appears at various spots throughout the brief:

> For example, suppose a married man . . . watches a sexually explicit film in a video viewing booth. If this customer is under surveillance by an unscrupulous vice officer assigned the task of finding lewd conduct violations in an adult bookstore, it would not be at all surprising to find fabricated charges brought against the individual . . . .

Id. at 30.

Yarns such as these are nothing more than "highly speculative injuries," *FW/PBS*, 493 U.S. at 248 (White, J., concurring in part and dissenting in part) that are completely repudiated by the facts of this case.

Unlike the facial challenge initiated shortly after the passage of the Dallas ordinance, the instant lawsuit was filed long after the ordinance was passed, when City News faced nonrenewal. In "facial" challenges such as these, the Court should apply its analysis set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) ("As a threshold matter, it is far from clear that [the plaintiffs] should be permitted to bring a facial challenge to this aspect of the regulation.")

Since the justifications for nonrenewal under Waukesha's Ordinance are objective, it is clear that any "grant of discretion that [plaintiff] seeks to challenge here is of an entirely different, and lesser, order of magnitude, because

[plaintiff] does not suggest that city officials enjoy unfettered discretion to deny [licenses] altogether." *Ward*, 491 U.S. at 793-94.

Moreover, one cannot just *presume* bias and bad faith in a facial challenge to an ordinance; indeed, the required presumption is that regarding public officials, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *United States v. Armstrong*, 517 U.S. 456 (1996).

Applying these principles, the Court in *Ward* took notice of the City's application of its regulation, and though couched in broad language, concluded: "Even if the language of the [regulation] were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement." *Ward*, 491 U.S. at 795.

Waukesha's application of the Ordinance to Petitioners is relevant because the Ordinance's *history* diminishes the credibility, if any exists, of Petitioner's parade of horrors:

> Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for "in evaluating a facial challenge to a state law, a federal court must .... consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside*, 455 U.S. 489, 494, n.5 (1982); see *Plain Dealer*, 496 U.S., at 769-770, and n. 11; *United States v. Grace*, 461 U.S., at 181, n.10; *Grayned v. City of Rockford*, *supra*,

> at 110; *Poulos v. New Hampshire*, 345 U.S. 395 (1953). Any inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.

Ward, 491 at 795-796.

The Waukesha Ordinance provides the necessary *Freedman* safeguards on its face. In addition to the language of the Ordinance and Wisc. Stats. Ch. 68, however, this Court should rely on the City's implementation of its regulation and the Wisconsin Court of Appeals' authoritative construction of the same. As interpreted, applied, and construed, the Ordinance satisfies the procedural safeguards laid out in the *FW/PBS* plurality.

B. The Waukesha Ordinance Requires A Decision On A Renewal Application In A Specified and Reasonable Period Of Time During Which The Status Quo Is Maintained.

Your *Amicus* urges the Court to make a plain statement that, where licensing regulations are content neutral, the first prong of *Freedman* is satisfied if the status quo (pre-ordinance operation or operating with a license) of the business is maintained during the period in which the City makes its initial determination on an application.

In this regard, the Wisconsin Court of Appeals correctly construed the City's 21-day time limit and concluded:

> Through these provisions, a decision must be rendered at the very least thirty-nine days before the license is due to lapse. As the City points

> out, because the common council's review of an application is completed prior to expiration of the license, the status quo is automatically maintained. Therefore, because we do not read *FW/PBS* as requiring anything more than the effective preservation of the status quo during the period in which the licensor makes its decision, we conclude that the ordinance satisfies the constitutional safeguards.

231 Wis. 2d at 113.

The 21-day determination satisfies *FW/PBS*'s requirement that the status quo be maintained until the City renders a decision on the license application. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994) ("Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process.") Thus, the Court should not add the time for administrative appeal (approximately 50 days) to the 21 day time frame set by the City for getting back to the applicant with a final determination.

This conclusion is especially warranted here, where the decision to not renew is based on objective criteria and not a subjective determination as to the content of speech. Unlike *Freedman*, the suppression of ideas is not at issue, but rather the ability of the City to prevent future illegal and unsanitary conduct. Requiring the City to give an offending enterprise continued rights to operate for months would eviscerate the community's ability to control secondary effects and implement reasonable regulations for sex business operations.

While the *business* may choose to seek administrative appeal and not immediate judicial review, City News incorrectly

assumes that the original 21 days must be added to the administrative appeal process to arrive at a total of 71 days before a determination can be deemed rendered. However, "[N]o one is suggesting that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS*, 493 at 248 (White, J., and Rehnquist, C.J., concurring in part and dissenting in part). As the *en banc* Seventh Circuit stated, "[a] person always has a judicial forum when his speech is allegedly infringed. . . . The 'safeguards' or the absence thereof neither expand nor detract from the courts' jurisdiction over constitutional questions." *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (*en banc*).

Nevertheless, City News concludes, "[A]s noted above, a renewal application is deemed timely if filed 60 days before the expiration of the license. Consequently, on its face, the ordinance fails to guarantee completion of administrative review of a timely filed renewal application before the currently-held license will expire."

This statement, which assumes the addition of administrative review days to the 21-day deadline for the City's determination, also fails to disclose the applicant's opportunities under the Ordinance. Section (7)(a), Renewal of License or Permit, states: "Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed *not later than* 60 days before the license expires." (emphasis added).

Of course, on its face, the Ordinance allows for a renewal application to be filed 75, 90, or even 120 days before the expiration of the currently-held license. *The fact that the applicant waits until the very last day to file his renewal application does not justify the invalidation of Waukesha's ordinance.* The operator of a sexually oriented business knows

whether violations justifying nonrenewal have been committed on his premises in recent months. (If he does not know, he is the type of operator that the City has an even stronger interest in holding accountable.) In any event, one who knows his license is subject to nonrenewal can anticipate that he will use the administrative appeal procedure, thus necessitating an earlier filing of his renewal application. An application filed 100 days prior to the expiration of the current license is just as, if not more, timely and also empowers applicants to avoid the parade of horribles imagined by Petitioner.

City News attempts to avoid this easy solution by repeating its argument that Chapter 68 allows for indefinite delays. This argument is foreclosed by the authoritative construction of the Wisconsin Court of Appeals:

> The ch. 68, STATS, framework for review provides a fixed timetable from the time of the municipal authority's initial determination to the date of the administrative review appeals board's decision. Contrary to City News's assertion, judicial review may not be delayed for an indefinite period of time . . . ."

231 Wis. 2d at 117. *See* Pet. Brief. at 9 (relying on Court of Appeals' decision as an authoritative construction: "While court convictions were offered in evidence in the current case, the ordinance on its face ad as specifically constructed by the Court of Appeals . . . .")

Because the city's review concludes prior to the license expiring, Municipal Code § 8.195 automatically preserves the SOB's status quo during the licensing period. The *FW/PBS* plurality's status quo requirement is therefore satisfied.

C. Any Prompt Judicial Review Requirement For Content Neutral Regulations Should Be Satisfied Through Access To An Independent Judicial Officer

After claiming at the outset of its brief that the definition of "prompt judicial review" is irrelevant to this case, on Page 7 City News seeks invalidation of the Waukesha Ordinance because "the duration of judicial review is itself essentially open-ended." Of course, this statement essentially seeks clarification of whether, in the context of content neutral licensing schemes, prompt judicial review requires access to the courts or a guarantee of a prompt judicial determination.

As stated above, a neutral SOB licensing ordinance is "significantly different from the censorship scheme examined in *Freedman*." *FW/PBS*, 493 U.S. at 229. *See also Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000) ("The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the *content* of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license"); *TK's Video*, 24 F.3d at 708 ("Licensing entails reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements. We are persuaded that Denton County's order creates less of a danger to free speech and requires a more time-consuming inquiry than screening movies.")

Where censorship is not involved, a content neutral regulation adequately protects constitutional rights by ensuring access to an independent judicial officer. As the Eleventh Circuit stated in *Boss Capital*:

> In sum, although *Freedman* appears to require prompt judicial resolution of censorship decisions, licensing decisions are different. We believe this is a situation for 'treating unlike things differently according to their differences.' *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (*en banc*). Accordingly, we agree with the First, Fifth and Seventh Circuits and hold that *access* to prompt judicial review is sufficient for adult entertainment licensing ordinances.

187 F.3d at 1256-57 (emphasis added).

Consequently, sexually oriented businesses should not receive a guarantee of continued operation pending full judicial determination because the potential for harm is substantial and the potential for content-based censorship is nonexistent where objective standards eliminate opportunity for unfettered discretion.

The rights of adult businesses appealing adverse licensing decisions based upon objective criteria are adequately safeguarded where the Ordinance affords "the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228. As stated by the Fifth Circuit, "the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. *A 'brief period' within which all judicial avenues are exhausted would be an oxymoron.*" *TK's Video*, 24 F.3d at 709 (emphasis added). Because that court found that "*FW/PBS* requires only a prompt judicial hearing," the municipality in question met the standard "by giving an unsuccessful license applicant 30 days to appeal to a district court . . . ." *Id.*

Notably, City News was afforded similar access to the Wisconsin courts. Under Chapter 68.12(1), Wisconsin Statutes, once the administrative appeals board issues its final determination, the appellant may seek immediate judicial review by filing a writ of certiorari within thirty days of the final determination. Hence, because Chapter 68, Wisconsin Statutes provides immediate access to the Wisconsin courts, it satisfies the *FW/PBS* plurality's judicial review requirement. As explained in *FW/PBS*, SOBS have enormous incentive to pursue administrative appeals and judicial review to its fullest. 493 U.S. at 230 ("Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court.")

Furthermore, the enterprise's sole remedy does not lie merely with the municipal licensing ordinance and the appeals thereunder. The practical reality is that federal and state courts will swiftly hear alleged First Amendment violations. Indeed, under Canon 3 of the Code of Judicial Conduct, a judge has the duty to "dispose promptly" of any motion for temporary restraining order or preliminary injunction.

A suit accompanied by such a motion could be brought in federal court complaining under *Elrod v. Burns*, 427 U.S. 347, 373 (1976) that delay in administrative proceedings or in state court is causing irreparable harm due to the loss of First Amendment liberties. A hearing on a motion for temporary restraining order or preliminary injunction is judicial review and thus would more than satisfy this Court's precedent. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965). As the *en banc* Seventh Circuit stated, "[a] person always has a judicial forum when his speech is allegedly infringed. . . . The 'safeguards' or the absence thereof neither expand nor detract from the

courts' jurisdiction over constitutional questions." *Graff*, 9 F.3d at 1324.

Finally, the subordinate First Amendment value of enterprises selling raw sexual material further counsels against guaranteeing "adult" businesses the right to operate in violation of content neutral regulations pending judicial review. This Court has on several occasions distinguished the protection received by core political, social, and religious expression and the marginal protection received by sexually graphic commerce. *See, e.g., Young,* 427 U.S. at 61 ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance"); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (quoting *Young*, 427 U.S. at 70-71 (plurality)) (also cited in *City of Erie v. PAP'S A.M.*, 529 U.S. 277, 281 (2000)) ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *City of Erie*, 529 U.S. at 278 (describing public nude dancing as expressive conduct, "although we think that it falls only within the outer ambit of the First Amendment's protection"); *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (plurality); *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

This Court has on more than one occasion recognized that government may afford different levels of protection to content-defined classes of speech. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court held that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is *justified* without reference to the

content of the . . . speech . . . ." *Id.* at 389 (internal quotation marks and citations omitted).

As even *Amicus* Florida Cannabis Action Network, Inc. stated, "[i]t would be a sad event in First Amendment jurisprudence if the Constitution were construed to say that core political speech – the very speech for which the First Amendment was added to the Constitution – enjoyed no more protection than sexually explicit, commercially exploited speech." *Brief Amicus Curiae*, Florida Cannabis Action Network at 8.

CONCLUSION

The procedural requirements of the prior restraint doctrine, rooted in efforts to prohibit content based censorship of speech, should not apply to content neutral licensing regulations that advance substantial government interests. In the event that they do apply, the City of Waukesha's ordinance provides a decision with a specified and reasonable period of time in which the status quo is maintained. Similarly, it provides for prompt judicial review under this Court's requirements in *FW/PBS.*

Accordingly, this Court should affirm the judgment of the Court of Appeals of Wisconsin.

Respectfully submitted,

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